



January 2, 2002

Ms. Linda Cloud  
Executive Director  
Texas Lottery Commission  
P.O. Box 16630  
Austin, Texas 78761-6630

OR2002-0019

Dear Ms. Cloud:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 156746.

The Texas Lottery Commission (the "commission") received a request for "a copy of Gtech's proposal, including pricing, submitted in response to the [commission's] Request for Proposals for Lottery Operations and Services, issued March 16, 2001." The requestor also seeks a copy of the proposal evaluation. You state that you are releasing some of the responsive information. You claim, however, that some of the requested information may be excepted from disclosure under sections 552.101 and 552.110 of the Government Code.<sup>1</sup> You also claim that a portion of the requested information should be released in accordance with section 552.022(a)(3) of the Government Code. You have notified GTECH Corporation ("GTECH"), a third party whose proprietary interests have been implicated by the request, of the request pursuant to section 552.305 of the Government Code. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Open Records Act in certain circumstances). We have considered all of the submitted arguments and reviewed the submitted information.

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<sup>1</sup> We note that you have informed this office that a claim of confidentiality is no longer asserted with respect to Volumes I and II of the requested proposal.

Initially, we address GTECH's argument that the submitted Contract for Lottery Operations and Services (the "contract") is not responsive to the present request. As the requestor specifically requests only GTECH's proposal and the commission's evaluation of this proposal, we agree that the contract is not responsive to this request and need not be released to the requestor.

Next, we note that the commission did not submit a copy of its evaluation of GTECH's proposal. To the extent such an evaluation exists, we assume that it has been released. If you have not released any such information, you must release it to the requestor at this time. *See Gov't Code §§ 552.301(a), .302.*

GTECH argues that portions of the requested information are excepted from disclosure under section 552.110(a) of the Government Code. Section 552.110(a) protects the property interests of private parties by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *See Gov't Code § 552.110(a).*

A "trade secret"

may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business in that it is not simply information as to single or ephemeral events in the conduct of the business, as for example the amount or other terms of a secret bid for a contract or the salary of certain employees. . . . A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

There are six factors to be assessed in determining whether information qualifies as a trade secret:

- (1) the extent to which the information is known outside of [the company's] business;

- (2) the extent to which it is known by employees and others involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and to [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing this information; and
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision No. 232 (1979). This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990). However, we cannot conclude that section 552.110(a) is applicable unless it has been shown that the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. Open Records Decision No. 402 (1983).

After reviewing GTECH's arguments and the information at issue, we conclude that GTECH has established the applicability of section 552.110(a) to most of the information it seeks to withhold. Accordingly, the commission must withhold most of the submitted information pursuant to section 552.110(a).

We note, however, that although GTECH argues that portions of its pricing proposal must be withheld under section 552.110(a), we do not believe that pricing information from a winning bid proposal is excepted from disclosure under section 552.110. *See* Open Records Decision No. 509 at 5 (1988) (stating that because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts was entirely too speculative); *see also* Gov't Code § 552.022(a)(3) (information in an account, voucher, or contract relating to the receipt or expenditure of public funds by a governmental body is public information); Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors). Therefore, the commission may not withhold the pricing information we have marked in GTECH's pricing proposal under section 552.110.

Further, GTECH has failed to demonstrate that certain other portions of its pricing proposal meet the definition of a trade secret. Therefore, this additional information, which we have marked, may not be withheld under section 552.110(a). GTECH, moreover, does not contend that this information is excepted under section 552.110(b). Thus, the commission must release the information we have marked in GTECH's pricing proposal.

To summarize, we conclude that: (1) the contract is not responsive to the present request and need not be released to the requestor; (2) the commission must release the requested evaluation of GTECH's proposal, to the extent it exists and has not already been released; (3) the commission must release the information we have marked in GTECH's pricing proposal; and (4) the commission must withhold the remaining submitted information under section 552.110(a).

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Karen A. Eckerle  
Assistant Attorney General  
Open Records Division

KAE/sdk

Ref: ID#156746

Enc: Submitted documents

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